Supreme Court, U.S.
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No. 951301

In The

Supreme Court of the United States

October Term, 1995

PAUL E. THOMSON, M.D.,

Petitioner,

v.

JUDITH A.K. HARMONY, PH.D., ANDREW T. FILAK, JR., M.D., EVELYN V. HESS, M.D., GENE CONWAY, M.D., JOHN HUTTON, M.D., JOSEPH BRODERICK, M.D., MICHAEL E. LUGGEN, M.D., and KATHLEEN ROBBINS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States District Court for the Southern District of Ohio has jurisdiction to consider an action for money damages against individual employees of the University of Cincinnati, a state university, pursuant to 42 U.S.C. § 1983 for denial of due process rights and denial of First Amendment rights?

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Petitioner, Paul E. Thomson, M.D., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on November 1, 1995.

OPINIONS BELOW

The United States District Court for the Southern District of Ohio granted Respondents' motion to dismiss amended complaint, which alleged violations of 42 U.S.C. § 1983 by state employees acting in their official capacities and in their individual capacities. The Order Granting Defendants' Motion to Dismiss is reproduced in the Appendix at p. 17. The United States Court of Appeals for the Sixth Circuit amended in part and affirmed in part the District Court's decision on September 18, 1995, and held that Petitioner waived his right for money damages pursuant to his § 1983 and First Amendment action against Respondents in their individual and official capacities by filing state law causes of action in the Ohio Court of Claims. The United States Court of Appeals for the Sixth Circuit denied Petitioner's motion for rehearing en banc on November 1, 1995. The opinion and judgment of the Sixth Circuit Court of Appeals denying the motion for rehearing en banc dated November 1, 1995 was not reported. A copy of the opinion is reproduced in the Appendix at p. 29. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit issued September 18, 1995 is reported at 65 F.3d 1314 (1995). A copy of the opinion is reproduced in the Appendix at p. 1.

JURISDICTIONAL STATEMENT

On November 1, 1995, the Sixth Circuit Court of Appeals entered judgment and opinion denying Petitioner's motion for rehearing en banc.

The jurisdiction of the Court to review the judgment of the Sixth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 10(1)(a) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, First Amendment.

Constitution of the United States, Fourteenth Amendment.

42 U.S.C. § 1983.

Ohio Rev. Code § 2743.02 & 2743.11

These provisions are reproduced, verbatim, in the Appendix commencing at pp. 30-36.

STATEMENT OF THE CASE

This action was commenced on December 2, 1991 in the United States District Court for the Southern District of Ohio pursuant to 28 U.S.C. § 1331 which provides the federal court jurisdiction for suits brought under 42 U.S.C. § 1983 to obtain redress for the deprivation under color of state law of rights, privileges and immunities

guaranteed by the constitution and laws of the United States.

The action not only alleged constitutional violations under 42 U.S.C. § 1983 but also allegations of breach of contract, slander, interference with an advantageous contractual relationship and other state claims. On or about June 8, 1992, the District Court granted Respondents' motion to dismiss all of Petitioner's state law claims, but denied Respondents' motion to dismiss the § 1983 claims against the Respondents in their official capacities. Respondents' did not request in this initial motion for partial dismissal that Petitioner's § 1983 claims against Respondents in their individual capacities be dismissed. The court dismissed the state law causes of action against Respondents in their individual capacities on grounds that under Ohio law, state employees may not be sued until it has been determined by the Court of Claims of Ohio that they are not entitled to immunity pursuant to Ohio Rev. Code § 2743.02(F). The District Court dismissed the state claims against Respondents in their official capacities based upon the 11th Amendment. A copy of the Order Granting in Part and Denying in Part Defendants' Motion for Partial Dismissal is reproduced in the Appendix at p. 20.

With leave of the Court, Petitioner filed an amended complaint in the District Court on May 17, 1993 adding to the original complaint allegations that the individual Respondents in both their official and individual capacities violated the First Amendment to the United States Constitution.

On June 3, 1993, Petitioner filed a complaint in the Court of Claims of Ohio captioned "Paul E. Thomson, M.D. v. Judith A.K. Harmony, et al." Petitioner filed an amended complaint in the Court of Claims on June 8, 1993. The action in the Court of Claims did not allege violations of 42 U.S.C. § 1983 or the First Amendment, but only those state law claims which the District Court had dismissed pursuant to the Respondents' original motion for partial dismissal.

On or about June 30, 1993, Respondents filed a motion to dismiss Petitioner's amended complaint in the District Court based upon § 2743.02(A)(1) of the Ohio Revised Code and the holding by the United States Court of Appeals for the Sixth Circuit in *Leaman v. Ohio Dept. of Mental Retardation and Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987), cert. den., 487 U.S. 1204 (1988). Petitioner filed his response to the motion to dismiss on July 29, 1993.

On September 14, 1993, the District Court granted Respondents' motion to dismiss the amended complaint based on the *Leaman* case. Petitioner timely appealed the District Court's order to the Sixth Circuit Court of Appeals on September 28, 1993.

This case involves Petitioner's claims for breach of due process and denial of guaranteed liberty and property rights granted to Petitioner pursuant to 42 U.S.C. § 1983; a violation of Petitioner's rights under the First Amendment; and state claims of promissory estoppel, slander, breach of contract and interference with an advantageous contractual relationship.

Petitioner is a Board Certified physician. Respondents are professors, physicians and a staff attorney who are employed at the University of Cincinnati, a state university. Petitioner began his clinical fellowship in Rheumatology and Immunology in the Department of Internal Medicine at the University of Cincinnati Medical Center in July of 1989 under the direction of Respondent Dr. Evelyn Hess. The fellowship was first promised to him pursuant to interviews in March of 1988 with Dr. Hess. In the initial interview and in subsequent conversations, Respondent, Dr. Hess, stated to Petitioner that he would have a three to four year fellowship and that the fellowship may even last a greater number of years, depending on the research. After Dr. Thomson began his fellowship, Respondents Dr. Harmony and Dr. Hess assured him of at least a three year fellowship when they applied for research grants.

The standard University of Cincinnati form signed by Petitioner contained a manual entitled "Institutional Responsibility for Graduate Medical Education." This procedural manual included sections detailing procedural and due process safeguards which were required to be followed by Respondents before any adverse action could be taken by them as supervisors.

Prior to June of 1989 and during the first eighteen months of his fellowship, Dr. Hess continually promised Dr. Thomson that his fellowship would be funded by submission of a grant proposal to the National Institute of Health and/or other agencies. In order to give Dr. Thomson the opportunity for continued research and to obtain grant funding for his third and fourth years of his

fellowship, Dr. Hess arranged for him to work in a laboratory supervised by Dr. Harmony. When Petitioner entered into Dr. Harmony's lab, he had substantial clinical duties. Dr. Thomson was required to pursue the clinical requirements of his fellowship and had entered into an agreement with Dr. Hess regarding the time he was to spend in the research lab with Dr. Harmony and the time he was to spend performing his clinical duties. Petitioner met his research responsibilities but Dr. Harmony became upset with him because she did not always see him in her laboratory. On November 30, 1990, an argument ensued between Petitioner and Dr. Harmony, in which Dr. Harmony asked Petitioner to leave her laboratory. Petitioner at that time told Dr. Harmony that he would report irregularities in her laboratory to the National Institute of Health.

After the confrontation with Dr. Harmony, Petitioner was not supported for any further grants, was not permitted to continue or to complete his research goals and no request for funds was ever submitted to the National Institute of Health and/or any other granting agencies.

Dr. Harmony complained to Respondents Dr. Hutton, Dr. Conway and Dr. Hess regarding the actions of Dr. Thomson. A Fact Finding Hearing was set up by Respondents Dr. Filak and Kathleen Robbins, based on their belief that such action was required pursuant to the Institutional Responsibility for Graduate Medical Studies. The Fact Finding Team composed of two physicians and Kathleen Robbins was to conduct a hearing and report their findings to Respondent Dr. Filak. Petitioner was never notified of the Fact Finding Hearing and therefore did not attend said hearing. The Fact Finding Team met

and interviewed Dr. Hess and Dr. Harmony and issued their report to Dr. Filak pursuant to the policy on which Dr. Thomson had relied.

Petitioner Dr. Thomson further filed grievances pursuant to the requirements for due process under the Responsibility for Graduate Medical Education, but said grievances were never heard. Dr. Thomson never received a third or fourth year of the promised fellowship nor was he able to meet his career goals in academic medicine.

Dr. Thomson continued his fellowship through June of 1991 but was never offered any further compensation or a paid research position. During the last six months of his employment and continuing through the present date, Respondents have continually made false and malicious allegations against Dr. Thomson, which have adversely affected his ability to obtain employment at the Medical College of Ohio, Toledo, and which will affect his ability in the future to find employment both in the practical and academic medical communities.

REASONS FOR GRANTING THE WRIT

1. The decision of the Sixth Circuit interpreting the relationship between Ohio Rev. Code § 2743.02 et seq. and 42 U.S.C. § 1983 is contrary to the interpretation of these sections by the Supreme Court of Ohio. The Sixth Circuit Court of Appeals has decided a federal question in conflict with the state court of last resort.

2. The finding of the Sixth Circuit that Petitioner waived his right to file a § 1983 action for money damages against individual employees of the University of Cincinnati by filing contract, slander and promissory estoppel claims in the Ohio Court of Claims departs from the accepted and usual course of judicial proceedings and is such a departure by the lower court that this Court must exercise its power of supervision.

Congress has stated a strong preference that claims under 42 U.S.C. § 1983 based on deprivations of constitutional rights be resolved in federal courts and that federal courts have a duty to take jurisdiction of these cases. See, e.g. *Monroe v. Pape,* 365 U.S. 167 (1961); *Mitchum v. Foster,* 407 U.S. 226 (1972).

A fundamental requisite of due process of law is the opportunity to be heard. The allegations in Petitioner's amended complaint in the District Court alleges lack of notice and of due process when Petitioner was denied the right to be heard. Failure to afford reasonable notice of a hearing is conduct which results in deprivation of liberty and property and waives the essential requisites of due process of law. *Connally v. General Construction Company,* 269 U.S. 385, 391 (1926). The Court of Claims of Ohio will not determine if Petitioner has been denied the essentials of due process. (Its decision is still pending.) The Court of Claims only heard contract, promissory estoppel and slander claims.

In *Patsy v. Board of Regency of State of Florida,* 457 U.S. 496 (1982) quoting from *Steffel v. Thompson,* 415 U.S. 452, 472, 473 (1974) the Court stated that when Federal claims

are premised on § 1983 they do not require exhaustion of state, judicial or administrative remedies.

The Court in *Patsy,* supra, recognized the paramount role Congress has assigned to federal courts to protect Petitioner's constitutional rights. The Court of Claims of Ohio will not protect Petitioner's constitutional rights. 42 U.S.C. § 1983 grants Petitioner the right to have his peers judge whether or not there has been a breach of his rights. The Court of Claims of Ohio did not permit Petitioner a jury trial nor punitive damages on any of the common law or constitutional issues. Ohio Rev. Code § 2743.11.

The net effect of the District Court's dismissal of Petitioner's § 1983 action is tantamount to requiring an exhaustion of state judicial remedies as a condition to the acceptance by a federal court of subject matter jurisdiction over a federally created right of action.

In *Davis v. Sherer,* 468 U.S. 183 (1984) this Court found that claimants should not be denied their federal claims based on state law. Also, in *Davis v. Wechler,* 263 U.S. 22 (1927) the court found that federal rights must be preserved and cannot be jeopardized by the interposition of state created defenses. At issue in *Davis v. Wechler,* supra, was whether a jurisdictional defense provided by federal law was waived by virtue of a state procedural law governing the effect of a personal appearance to contest a matter on the merits. The court stated, "whatever springes, the state may set for those who are endeavoring to assert certain rights that the state confers, the assertion of federal rights when plainly and reasonably made is not to be defeated under the name of local practice." In

General Oil v. Krane, 209 U.S. 211 (1908) the state argued its sovereign immunity as a defense to the federal claims. The Supreme Court rejected the state's sovereign immunity defense and stated "if a suit against state officers is precluded in the national courts by 11th Amendment . . . and may be forbidden by state to its courts . . . an easy way is open to prevent the enforcement of many provisions of the Constitution in the 14th Amendment . . . ". The rationale behind the foregoing principles is that the state and local governments have no authority to place conditions for, add elements to, or set limits on federal causes of action. Any such efforts to do so are inconsistent with congressional intent. The lower court's decision in this matter conflicts with the policy underpinned by the Supremacy Clause by placing a primacy on the judicial protection of federally created rights. The lower court's decision threatens a uniform federal jurisdiction policy that civil rights laws supersede state created remedies and procedures which stand "as an obstacle to the accomplishment and execution of the full purposes and objections of Congress." *Maryland v. Louisiana,* 451 U.S. 725, 746-47 (1981). Both in *McCleary v. O'Hare,* 786 F.2d 83, 85 (2d Cir. 1986) and *Tellis v. U.S. Fidelity & Guaranty Co.,* 625 F. Supp. 92 (N.D.Ill. 1985) the courts held that workers compensation statutes did not bar plaintiffs from pursuing their federal civil rights claims against their employers.

This petition for writ of certiorari is not a revisitation of the petition for writ of certiorari in *Leaman v. Ohio Dept. of Mental Retardation and Developmental Disabilities,* 825 F.2d 946 (6th Cir. 1987), cert. den., 487 U.S. 1204 (1988). Since this Court's denial of a petition for writ of

certiorari in *Leaman*, the Supreme Court of Ohio has decided the case of *Conley v. Shearer*, 60 Ohio St. 3d 284 (1992). In *Conley*, the Supreme Court of Ohio found that a statute requiring the plaintiff, who potentially had claims against the state as a result of a state employees conduct, did not waive his right to file a § 1983 action in the Ohio Court of Common Pleas because he had filed a claim based upon the same set of facts in the Ohio Court of Claims. In *Conley*, supra, the Supreme Court of Ohio found that Ohio Rev. Code § 2743.02(F) did not apply to 42 U.S.C. § 1983 claims when such claims are pursued in state court.

Conley v. Shearer, supra, was followed by Ohio Court of Appeals decisions after this Court's denial of petition for certiorari in *Leaman*, supra. In *Worrell v. Athens County Court of Common Pleas*, 633 N.E.2d 1130 (1994 Ohio), the court found that an Ohio university student after losing in the Court of Claims could file an additional complaint in the Ohio Court of Common Pleas against his teacher and § 2743.02 of the Ohio Revised Code did not cause a waiver of right to file in the Court of Common Pleas. In *Elliot v. Ohio Department of Rehabilitation and Corrections*, 637 N.E.2d 106 (1994 Ohio App.10th Dist.), the court permitted an employee of the State of Ohio agency to bring an action in the Court of Claims against the employer and also an action in the Court of Common Pleas because the individual working for the Ohio Department of Rehabilitation and Corrections acted outside the scope of his employment. Petitioner's District Court Complaint alleges that the Respondents Drs. Conway, Hess, Filak and others acted outside the scope of their employment when they violated his rights under 42

U.S.C. § 1983. In *Kellon v. Cleveland Marshall College of Law*, 102 Ohio App.3d 684 (1995), the Ohio Court of Appeals found that the lower court erred when it dismissed the case for lack of subject matter jurisdiction because the plaintiff's federal constitutional claims set forth in the complaint were not waived by an action in the Court of Claims under § 2743.02 of the Ohio Revised Code.

The finding of the Sixth Circuit Court of Appeals dismissing Petitioner's action for money damages against the individual employees of the University of Cincinnati because he filed in the federal district court and not in the Court of Common Pleas of Ohio presents an anomaly allowing state but not federal courts to determine claims under 42 U.S.C. § 1983.

CONCLUSION

Petitioner has stated a valid claim under 42 U.S.C. § 1983 against Respondents. The failure of the District Court to permit the Petitioner to pursue money damages in the District Court for violation of his rights under the First and Fourteenth Amendments to the Constitution denies him the right to a jury trial, denies him the right to punitive damages, and denies him those rights protected

against the acts of individual employees of the State of Ohio.

Respectfully submitted,

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January 22, 1996

No. 93-4089

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

PAUL E. THOMSON, M.D., *Plaintiff-Appellant,* *v.* JUDITH A.K. HARMONY, ANDERW T. FILAK, JR., M.D., EVELYN V. HESS, M.D., GENE CONWAY, M.D., JOHN HUTTON, M.D., JOSEPH BRODERICK, M.D., KATHLEEN ROBBINS, and DONALD EBERSOLD, M.D., *Defendants-Appellees.*	)	ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed September 18, 1995

Before: MERRITT, Chief Judge; and KEITH and BOGGS, Circuit Judges.

BOGGS, J., delivered the opinion of the court, in which KEITH, J., joined. MERRITT, C.J. (pp. 13-14), delivered a separate dissenting opinion.

BOGGS, Circuit Judge. Plaintiff Paul Thomson appeals from the district court's dismissal of his suit pursuant to *Leaman v. Ohio Dept. of Mental Retardation and Development Disabilities,* 825 F.2d 946 (6th Cir. 1987) (*en banc*), *cert. denied,* 487 U.S. 1204, 108 S.Ct. 2844, 101

L.Ed.2d 882 (1988). For the reasons below, we affirm in part and reverse in part the decision of the district court.

I

In July 1989, Thomson began a clinical fellowship in the Division of Immunology at the University of Cincinnati College of Medicine, where all of the defendants are employed in various capacities. Thomson took the position at the hospital in order to pursue a career in academic medicine, and he conducted research in rheumatology in Dr. Harmony's laboratory. Thomson and Dr. Harmony had a falling out, which escalated to the point that Thomson was ultimately expelled from the lab, jeopardizing his application for a National Institutes of Health ("NIH") research fellowship and damaging his career prospects. Thomson alleges he was denied the procedural safeguards and hearings guaranteed in the Hospital's policy manual, and that several of the defendants drove him out of his position at another hospital.

On December 2, 1991, Thomson sued the eight defendants under 42 U.S.C. § 1983 in federal court. He asserted that the defendants had deprived him of property and liberty interests without due process of law, and he also raised several state law causes of action. The defendants answered and moved on February 14, 1992, for partial dismissal and/or partial judgment on the pleadings.

In an order dated June 8, 1992, the district court dismissed Thomson's state law claims against the defendants in their official capacities, holding that those claims

were barred by the Eleventh Amendment. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890). Thomson's state law claims against the defendants in their individual capacities were also dismissed, because Ohio gives state employees immunity unless the Court of Claims finds they fall under one of four statutory exceptions. Ohio Rev. Code § 9.86 (Baldwin 1994). However, the district court permitted Thomson's § 1983 claims for prospective injunctive relief against the state to proceed, finding that his allegations fit within the exception to Eleventh Amendment immunity established in *Ex parte Young*, 209 U.S. 123 (1908).

With the district court's permission, Thomson filed an amended complaint on May 17, 1993, which added allegations that the defendants, in their official and individual capacities, violated his First Amendment rights by their actions in response to statements he made to Dr. Harmony and by continuing to hinder his employment. Thomson sought monetary relief (compensatory damages, attorney's fees and punitive damages) against the defendants in their individual and personal capacities, as well as prospective relief[1] from them in their official capacities. The defendants filed an answer to the amended complaint.

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[1] Thomson's claims for injunctive relief are among his most important. He seeks reinstatement to a position as a researcher, an order that the hospital support his efforts for future research funding, and the defendants' expungement from his record of all negative entries arising from his dispute with Dr. Harmony and the hospital.

On June 3, 1993, Thomson filed an action in the Ohio Court of Claims. This action did not allege violations of the First Amendment or of § 1983, but raised only the state law claims (breach of contract, defamation, promissory estoppel, interference with advantageous contractual relationship, and breach of promise) that the district court had previously dismissed in its June 8, 1992, ruling. Thus, Thomson sued, in their official capacities, seven of the same eight defendants[2] from his federal suit, seeking $500,000 in damages, attorney's fees and court costs.

In a "pre-screening entry" dated June 4, 1993, the Court of Claims struck the demand for attorney's fees because the court was not empowered to award that relief, and substituted the University of Cincinnati College of Medicine as defendant because "[u]nder [Ohio Rev. Code §] 2743.02E, only state agencies and instrumentalities can be defendants in original actions in the Court of Claims." Thomson amended his complaint in the Court of Claims on June 8, 1993, suing the defendants as individuals "because [their] conduct was outside the scope of [their] employment or official responsibilities and in bad faith."

On June 30, 1993, defendants moved for dismissal of Thomson's claims in federal court based on this circuit's holding in *Leaman*, arguing that the causes of action in Thomson's suit in the Court of Claims and in federal district court were "based on the same act or omission." The district court agreed, and on September 14, 1993, it

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[2] Thomson added Dr. Michael E. Luggen as a defendant based on his alleged defamation arising from a negative recommendation; Dr. Ebersold was dropped from the state lawsuit.

granted the motion, dismissing his remaining causes of action. Thomson timely appeals.

II

A district court's conclusions of law are subject to *de novo* review on appeal. *United States v. Braggs*, 23 F.3d 1047, 1049 (6th Cir.), *cert. denied*, 115 S.Ct. 274, 130 L.Ed.2d 191 (1994); *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989). An appellate court must review the evidence "in the light most likely to support the district court's decision." *Braggs*, 23 F.3d at 1049, *citing United States v. Gomez*, 846 F.2d 557, 560 (9th Cir. 1988). In *Leaman v. Ohio Dept. of Mental Retardation and Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987) (*en banc*), *cert. denied*, 487 U.S. 1204, 108 S.Ct. 2844, 101 L.Ed.2d 882 (1988), this court interpreted a provision of the Ohio Court of Claims Act as requiring a plaintiff who files suit against state officials in the Court of Claims to waive his federal, as well as state, causes of action. The pertinent provision reads:

> [F]iling a civil action in the court of claims results in a complete waiver of *any* cause of action, based on the same act or omission, which the filing party has against any state officer or employee.

Ohio Rev. Code Ann. § 2743.02(A)(1) (Baldwin 1994) (emphasis added). The *Leaman* court found that the word "any" was unambiguous, and "the Ohio legislature clearly provided for waiver of federal causes of action." 825 F.2d at 952.

Ordinarily, Ohio state employees are entitled to immunity against state law claims for actions taken in their official capacities:

> [N]o officer or employee shall be liable in any civil action that arises under the law of this state for damages or injury caused in the performance of his duties, unless . . . [his] actions were manifestly outside the scope of his employment or official duties, or unless [he] acted with malicious purpose, in bad faith, or in a wanton and reckless manner.[3]

Ohio Rev. Code Ann. § 2743.02(A)(1) (Baldwin 1994).

Thus, our circuit interpreted the Court of Claims Act as establishing a *quid pro quo*, in which the state consents to be sued in exchange for a plaintiff's waiver of claims against the state's employees. Such a bargain did not impose an "unconstitutional condition" because until Ohio abandoned its sovereign immunity in the statute, plaintiffs had no cause of action at all:

> The *quid pro quo* received by Ms. Leaman was not illusory, and the bargain she accepted was not unfair. . . . Ohio was under no constitutional duty to let itself be sued at all, and it was not

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[3] An action alleging that the state officer's actions falls within one of these exceptions "shall first be filed against the state in the Court of Claims, which has exclusive, original jurisdiction to determine, initially, whether the officer is entitled to civil immunity under § 9.86. . . . " Ohio Rev. Code § 2743.02(F); *Haynes v. Marshall*, 887 F.2d 700, 704 (6th Cir. 1989). If the Court of Claims finds that a state employee's actions were *ultra vires* or malicious, the plaintiff's waiver is void and a lawsuit in federal court may be reinstated. *Walton v. Dallman*, No. 90-3285, 1990 WL 146915 (6th Cir. 1990), *citing Leaman*, 825 F.2d at 952-53.

> unreasonable for the state to tell prospective plaintiffs . . . "we will agree to let you sue the sovereign if you will agree to surrender your claims against the sovereign's servants." When one considers the depth of the sovereign's pockets in comparison to the depth of the servants', and when one remembers that Ms. Leaman was *not* required to give up her right to seek reinstatement through an injunction . . . it is hard for us to see how the state could possibly be . . . guilty of overreaching.

Id. at 954-55. The court further noted:

> The price seems small enough when one recalls that a finding of malice by the Court of Claims would have enabled Ms. Leaman to proceed with her punitive damages claims against the individuals – and absent malice, the claims had no merit anyway.

Id. at 956 n. 3.

The court also concluded that Leaman's waiver was voluntary because she was represented by competent counsel who "must be presumed to have known what the Court of Claims Act said." *Id.* at 956. Unlike a waiver in a criminal case, "it was not incumbent upon the court to make sure that her lawyer had adequately explained the effect of her action." *Ibid.*

Leaman has been followed in cases involving Ohio's Court of Claims Act, *Haynes v. Marshall*, 887 F.2d 700 (6th Cir. 1989), and has been applied to similar statutes in other states. *White v. Gerbitz*, 860 F.2d 661 (6th Cir. 1988) (Tennessee), *cert. denied*, 489 U.S. 1028, 109 S.Ct. 1160, 103 L.Ed.2d 219 (1989). Where *Leaman* has not been followed, it has been on the basis of factual distinctions rather than

any disagreement with the principles in the case. *See Carrelli v. Ginsburg,* 956 F.2d 598, 603 n. 9 (6th Cir. 1992); *Majer v. Metropolitan Trans. Auth.,* 1992 WL 110995 (S.D.N.Y.1992).

The Ohio Supreme Court has held that a claim under § 1983 may be brought directly in the Court of Common Pleas, and thus is not subject to Ohio Rev. Code § 2743.02(F), which requires a preliminary determination by the Court of Claims of whether the state officials acted *ultra vires. Conley v. Shearer,* 64 Ohio St.3d 284, 595 N.E.2d 862, 869-70 (1992). Therefore, a plaintiff may choose to sue a state employee or official for violations of federal law in the Court of Common Pleas, recognizing that such a forum cannot grant money damages against the state. *Conley* and its progeny have reversed dismissals for lack of jurisdiction of suits filed in the Court of *Common Pleas. Ibid.; Mullins v. Birchfield,* 623 N.E.2d 651, 652 (Ohio Ct. App. 1993); *Johnson v. Morris,* No. 93CA1969, 1993 WL 524976, at *1-2 (Ohio. Ct. App. Dec. 13, 1993).

However, contrary to the dissent, *Conley* does not alter the calculus where a party chooses to waive certain claims in order to gain access to the state's coffers via the Court of Claims; then, a plaintiff's decision to file in that forum mandates dismissal under § 2743.02*(A)(1),* not § 2743.02(F). In such a case, a party's claims are dismissed "because she opted to bring a related action against a state agency in the Court of Claims." *Egesimba v. Ohio Dep't of Rehabilitation and Correction,* No. 92-3703, 1993 WL 262545, at *2 (6th Cir. July 8, 1993). In essence, a plaintiff may sue the state under § 1983 in the Court of Common Pleas instead of the Court of Claims, but if he chooses the latter, he is bound by his decision.

III

The University of Cincinnati is a state instrumentality and therefore amenable to suit in the Ohio Court of Claims. *McIntosh v. University of Cincinnati*, 24, 493 N.E.2d 321 (Ohio App. 1985); *Collins v. University of Cincinnati*, 444 N.E.2d 459 (1981). The university's hospital is an agent of the university that is entitled to its immunity from suit in federal court. *Dillion v. University Hosp.*, 715 F.Supp. 1384 (S.D. Ohio 1989).

The district court dismissed Thomson's suit in federal court because, while recognizing that his "different complaints allege distinct causes of action, both derive out of the same acts or omission surrounding the discharge of [Thomson] and his loss of funding." *Order Granting Defendants' Motion to Dismiss*, Sept. 14, 1993, at 2. This court must review whether the acts or omissions alleged in the district court were the same as those alleged in the state court. Lower court findings of ultimate facts based upon the application of legal principles to subsidiary facts are subject to *de novo* review. *Whitney v. Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989); *Taylor and Gaskin, Inc. v. Chris-Craft Indus.*, 732 F.2d 1273, 1277 (6th Cir. 1984).

Thomson argues that his state claims contain no counterpart to his First Amendment claims that the defendants retaliated against him for his for his refusal to complete Medicare and Medicaid forms and for threatening to report lab irregularities to the NIH. In his brief, Thomson mistakenly assumes that the state and federal actions have to share the same *legal* or theoretical foundation – "[t]he claims in . . . Ohio lie in contract and

tort . . . while the cause of action in the District Court is based on constitutional guarantees. . . . " However, the same "acts" of retaliation by the defendants form the basis of his state court causes of action for defamation and promissory estoppel, and the statute specifically refers to an "act" rather than an "allegation" or "claim."[4]

Clearly, both the federal lawsuit and the action filed in the Ohio Court of Claims are "based on the same act or omission." The substitution of Dr. Ebersold for Dr. Luggen does not alter this analysis,[5] as all of Thomson's claims derive from his expulsion from Dr. Harmony's lab, the University's alleged failure to handle his grievances properly, and the resulting record of the conflict contained in Thomson's personnel file. In fact, Thomson admitted as much in his first complaint filed in federal court: "This Court also has pendent jurisdiction over the state claims since *substantially the same evidence and facts*

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[4] Thomson also erroneously claims *Leaman* is inapplicable because his state court suit does not have the same defendants as his federal suit, nor was it filed simultaneously, as Thomson claims was the case in *Leaman*. A close reading of *Leaman* reveals that the state and federal suits were *not* filed simultaneously. Moreover, the statute does not limit its scope by either requiring simultaneous filing or restricting who may be a defendant, but instead is directed toward "cause[s] of action based on the same act or omission."

[5] Thomson also contends that because he sued different defendants in his state action than in his federal claim, *Leaman* does not apply. By adding a new defendant (Dr. Luggen) in his state court claim, Thomson can not evade dismissal of his entire federal suit – that would reduce *Leaman* to a formality of pleading a "straw man" defendant in the Court of Claims.

will prove both the federal and nonfederal claims." Complaint at 3 (emphasis added).

Thomson's final arguments are that the district court decision improperly limits the ability of § 1983 claimants to proceed in federal court independent of state interference, conflicts with federal constitutional remedies, and denies him a fair hearing. However, these same issues were raised and resolved in the *Leaman* case, *id.* at 953-57, and Leaman is still good law in this circuit. "A panel of this Court cannot overrule the decision of another panel. The prior decision remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision." *Salmi v. Secretary of Health and Human Servs.*, 774 F.2d 685 (1985).

IV

Although the substantial identity between the facts of Thomson's suit in federal court and his suit in the Ohio Court of Claims warrants dismissal under Leaman, Thomson's equitable claims survive regardless of whether they are "based on the same act or omission."

The district court originally denied the defendants' motion to dismiss Thomson's claims seeking declaratory and injunctive relief against the defendants in their official capacities, invoking the longstanding doctrine of Ex parte Young. *Order Granting in Part and Denying in Part Defendants' Motion for Partial Dismissal*, June 8, 1992, at 4-6. In Young, the Supreme Court held that the Eleventh Amendment's jurisdictional bar to suits against states in federal court does not apply to an action to enjoin a state official from violating federal law. 209 U.S. 123. The Court

reasoned that an official cannot be acting on behalf of the state when she acts illegally or unconstitutionally, and therefore is not entitled to the state's immunity. *Id.*

The Court clarified the scope of the doctrine in *Edelman v. Jordan*, 415 U.S. 651 (1974), where it held that the Eleventh Amendment prohibited retroactive relief, but allowed prospective relief compelling a state officer's compliance with federal law.[6] Thus, whether a plaintiff characterizes his suit as being in law or in equity is not dispositive, nor is whether the state is a named party in the suit. *Id.* at 666. Rather, the Court looked at the bottom line: whether the suit would "impose a liability which must be paid from public funds in the state treasury." *Id.* at 663. Prospective relief which has an incidental or ancillary effect on the state treasury will be allowed.[7] *Id.* at

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[6] In *Edelman*, the plaintiffs sought an injunction requiring state officials to process a federal-state aid program promptly, in accordance with the controlling federal statute, as well as recovery of funds not paid in the past due to the improper processing. The Court permitted the former, but denied the payment of past monies despite the equitable nature of the claim.

[7] Distinguishing between legitimate or incidental costs of implementing a government program or court order has often proved difficult. *See Edelman*, 415 U.S. at 667 ("The difference between the type of relief barred . . . and that permitted under *Ex parte Young* will not in many instances be that between day and night."); *see also, Hutto v. Finney*, 437 U.S. 678 (1978) (allowing attorney's fees in suit seeking injunction against state); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299, 304-05 (6th Cir. 1984) (looking to state law to determine whether recovery would come out of independent funds of state medical school), *cert. denied*, 469 U.S. 1113 (1985); *Foulks v. Ohio Dep't of Rehabilitation and Correction*, 713 F.2d 1229, 1232 (6th Cir. 1983) (reversing award of relief "[e]ntirely retrospective in nature").

668; *see Quern v. Jordan*, 440 U.S. 332, 347-49 (1979) (requiring state to notify class members that it had acted illegally and inform them of administrative remedies was relief ancillary to injunction); *Doe v. Wigginton*, 21 F.3d 733, 737 (6th Cir. 1994)

However, in this case, Thomson's claims for prospective relief do not pose a threat to Ohio's coffers, and thus fall squarely under the rule of Young. Any expense of implementing the requested relief would be minimal and ancillary to the main purpose and effect of Thomson's suit – eliminating all negative entries in his personnel record and reinstatement and support as a researcher.

Equitable claims of this sort are not waived by filing suit in the Court of Claims for several reasons. First, the *quid pro quo* rationale of Leaman is inapplicable where Ohio has no Eleventh Amendment immunity to trade for a plaintiff's surrender of his rights against state employees: Thomson always had the ability to proceed against the defendants pursuant to Young, so the state has offered no consideration for his waiver. Second, the incentive of access to the sovereign's deep pockets does not exist where money damages are not sought. Instead, Thomson is merely asking that if he prevails on the merits, the state must fulfill, through its employees, its pre-existing legal duty to comply with federal law. *Young* and *Edelman* makes clear that a state has no interest in shielding its servants from such an order.

Third, the bargain analysis of Leaman is further undermined by the Court of Claims's inability to grant any relief other than money damages. Thus, a party must choose between seeking equitable relief in the Ohio Court

of Common Pleas or suing for monetary damages in the Court of Claims, a tradeoff and waiver not contemplated in Leaman.

Finally, this circuit does not require waiver of equitable claims in federal court actions. As stated by the court in *Leaman* – "when one remembers that Ms. Leaman was *not* required to give up her right to seek reinstatement through an injunction . . . it is hard for us to see how the state could possibly be . . . guilty of overreaching." 825 F.2d at 955.

V

Finding that Thomson's lawsuit in federal court is "based on the same act[s] or omission[s]" as his suit filed in the Ohio Court of Claims, we AFFIRM the district court's dismissal of Thomson's claims for monetary damages, but REVERSE the dismissal of his claims for prospective relief.[8]

MERRITT, Chief Judge, dissenting.

In *Leaman v. Ohio Dep't of Mental Retardation and Dev. Disabilities*, 825 F.2d 946, 960 (6th Cir. 1987), I dissented on several grounds, one of which was that even in 1987 it

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[8] Implicit in this ruling is that Thomson may reinstate his federal suit if the Court of Claims finds that the defendants are not entitled to immunity. *Crooks v. Stokes*, No. 87-3860, 1989 WL 112995, at *2 (6th Cir. 1989). Accordingly, the statute of limitations on Thomson's federal claims are tolled in the interim. *Id.*, *see Walton*, 1990 WL 146915 ("the mere filing of a claim against the state does not necessarily divest the federal court of jurisdiction. . . . ").

seemed to me that "rulings from the Ohio courts indicate that the constitutional violations which form the basis for the § 1983 action would be outside the scope of employment and therefore not waived" and that under Ohio case law "merely filing a Court of Claims suit does not create an irrevocable waiver [of § 1983 claims] under Ohio Rev. Code Ann. § 2743.02(A)(1) (Baldwin 1986) [citing and discussing cases]." *Id.* at 963. I adhere to that view because now it is even more clear that the provisions of the Court of Claims waiver statute, "R.C. 2743.02 and R.C. 9.86 . . . do not apply to claims brought under federal law," *Conley v. Shearer*, 64 Ohio St.3d 284, 292, 595 N.E.2d 862, 869 (1992).[1] The Supreme Court of Ohio has now

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[1] The entire relevant language from Chief Justice Moyer's unanimous opinion in Conley is as follows:

> The trial court dismissed Conley's Section 1983 claim on the same grounds as his other claims, *i.e.*, lack of subject matter jurisdiction pursuant to R.C. 2743.02 and R.C. 9.86. *Those sections, however, do not apply to claims brought under federal law. R.C. 9.86 expressly limits its coverage to "any civil action that arises under the law of this state* * * *."* (Emphasis added.)
>
> Moreover, the United States Supreme Court has concluded that " ' "[c]onduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983 or § 1985(3) cannot be immunized by state law," ' " " 'even though the federal cause of action [was] being asserted in the state courts.' *Howlett v. Rose* (1990), 496 U.S. 356, 376, 110 S.Ct. 2430, 2443, 110 L.Ed.2d 332, 353, quoting *Martinez v. California* (1980), 444 U.S. 277, 284, 100 S.Ct. 553, 558, 62 L.Ed.2d 481, 488, and at fn. 8. The court in *Howlett* continued, " '[a] construction of [Section 1983 or 1985(3)] which permit[s] a state immunity defense to have controlling effect would transmute a basic guarantee into an

expressly agreed that federal claims are not waived as a matter of Ohio law, and we should simply admit our mistake in Leaman and not persist in it, as though we know more about Ohio law than the Ohio Supreme Court. It did not make much sense in 1987 to hold that Ohio, without saying so expressly, had attempted to oust the federal courts of § 1983 jurisdiction, and it makes even less sense now after the Supreme Court of Ohio has said so with pluperfect clarity. Why should we continue to search for a way to deny § 1983 jurisdiction? We serve no policy or purpose in doing so, and the Ohio courts do not agree with us.

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illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced.' "

595 N.E.2d at 869. (Emphasis added.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PAUL E. THOMSON, M. D., Plaintiff,	:	Case No: C-1-91-856
v.	:	ORDER GRANTING DEFENDANTS' MOTION TO DISMISS
JUDITH A.K. HARMONY, et al., Defendants.	:	(Filed Sep. 14, 1993)

This matter is before the Court on the Defendants' Motion to Dismiss (doc. 85), the Plaintiff's Memorandum in Opposition (doc. 89), and the Defendants' Reply (doc. 91).

This is an action alleging various claims stemming from the Plaintiff's discharge from his research position at the Defendant's laboratory at the University of Cincinnati, and the Defendants' failure to support funding for the Plaintiff. The Plaintiff has also filed a claim in the Court of Claims of Ohio, likewise stemming from the Plaintiff's discharge from his research position at the University of Cincinnati Laboratory, and the Defendants' failure to support fellowship funds for the Plaintiff. The claims filed in the Court of Claims were originally filed in this action, but were dismissed as barred by the Eleventh Amendment. See Order Granting in Part and Dismissing in Part Defendants' Motion for Dismissal, Doc. 21, at 4.

The Defendants have moved this Court pursuant to §2743.02(A)(1) of the Ohio Rev. Code. Section 2743.02(A)(1), states in pertinent part,

> Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any action, based on the same act or omission, which the filing party has against any state officer or employee.

The Defendants claim that the action before this Court and the one filed in the Court of Claims, are "based on the same act or omission" and therefore, under Ohio Rev. Code §2743.02(A)(1), this action should be dismissed.

In opposition to the Defendants' motion, the Plaintiff contends that the state and federal actions do not allege the same causes of action, and thus, section 2743.02(A)(1) does not mandate dismissal. The Plaintiff contends that the federal action alleges causes of action under sections 1983 and 1988, and the First Amendment to the Constitution. On the other hand, the Plaintiff claims, the Court of Claim action is based on state causes of actions such as promissory estoppel.

In *Leaman v. Ohio Dept. of Mental Retardation*, 825 F.2d 946 (6th Cir. 1987), the court held that, in "providing that an election to sue the state in the Court of Claims results in a complete waiver of any cognate cause of action against individual state officers or employees, the Ohio legislature clearly provided for waiver of federal causes of action, as well as actions based on state law." *Id.* at 952. In this case, although the different complaints allege distinct causes of actions, both derive out of the same acts or omission surrounding the discharge of the Plaintiff and his loss of funding. Consequently, we are bound to dismiss the Plaintiff's case, as the Plaintiff's election to file an action in the "Court of Claims [has] result[ed] in a complete waiver of any cognate cause of action against

individual state officers or employees . . . [and constitutes a] waiver of [his] federal causes of action. . . . *Leaman*, 825 at 952.

Accordingly, we hereby GRANT the Defendants' Motion to Dismiss, and this action is DISMISSED.

SO ORDERED.

Dated: 9/14/93 /s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

EXHIBIT
D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

PAUL E. THOMSON, M.D., Plaintiff,	:	Case No. C-1-91-856
vs.	:	ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR PARTIAL DISMISSAL
JUDITH A. K. HARMONY, et al., Defendants.	:	(Filed Jun. 3, 1992)

This matter is before the Court for consideration of the defendants' motion for partial dismissal and/or partial judgment on the pleadings and/or partial summary judgment (doc. 9). The plaintiff responded (doc. 14), and the defendants replied (doc. 15). For the reasons set forth below, the defendants' motion is hereby granted as to the plaintiff's state claims, but denied as to the plaintiff's § 1983 claims against the defendants in their official capacities.

BACKGROUND

The plaintiff, a physician, accepted a clinical fellowship in the Division of Immunology at the University of Cincinnati College of Medicine. He now claims that the defendants wrongfully denied him access to Harmony's laboratory and withdrew their support of his efforts to seek external funding. Dr. Thomson initiated this action

pursuant to 42 U.S.C. § 1983 alleging that the defendants' actions deprived him of property and liberty interests without due process of law in violation of the Fourteenth Amendment to the United States Constitution. Dr. Thomson also attempts to state supplemental state law claims for slander, promissory estoppel and interference with an advantageous contractual relationship.

The defendants, eight employees of the University of Cincinnati College of Medicine, have been sued in both their official and individual capacities. The defendants now seek partial dismissal and/or summary judgment on: (1) the plaintiff's § 1983 claims against the defendants in their official capacities; (2) the plaintiff's supplemental state law claims against the defendants in their official capacities; and (3) the plaintiff's supplemental state law claims against the defendants in their individual capacities.

STANDARD OF REVIEW

In determining whether to dismiss claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the court must accept as true all factual allegations made in the complaint. *Jones v. Sherrill*, 827 F.2d 1102 (6th Cir. 1987). "The motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle [him] to relief." *Id.* at 1103; *See Conley v. Gibson*, 355 U.S. 41 (1957).

The narrow question that we must decide on a motion for summary judgment is whether there is "no genuine issue as to any material fact and [whether] the

moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The Court cannot try issues of fact on a Rule 56 motion, but is empowered to determine only whether there are issues to be tried. *In re Atlas Concrete Pipe, Inc.*, 668 F.2d 905, 908 (6th Cir. 1982). The moving party "has the burden of showing *conclusively* that there exists no genuine issues as to a material fact and the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.) (emphasis original), *cert. denied*, 444 U.S. 986 (1979).

Summary judgment "must be used only with extreme caution for it operates to deny a litigant his day in court." *Id.* The Supreme Court elaborated upon this standard, in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. . . .

Id. at 322. Summary judgment is not appropriate if a dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

DISCUSSION

The defendants seek dismissal on three catagories of claims: (1) § 1983 claims against defendants in their official capacities; (2) supplemental state law claims against defendants in their official capacities; and (3) supplemental state law claims against various defendants in their individual (or personal) capacities. The Court will consider each catagory separately.

Section 1983 Official Capacity Claims

The Eleventh Amendment to the United States Constitution provides, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State." In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Court held that, although the language of the Eleventh Amendment is limited, it bars a federal court from entertaining a suit brought by a citizen against his own state.

However, the Eleventh Amendment does not bar a suit to enjoin a state official's allegedly unconstitutional actions. *Ex parte Young*, 209 U.S. 123 (1908). Further, neither a state nor an official sued in his or her official capacity is a "person" within the meaning of § 1983 for purposes of compensatory damages. *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). However, a state official sued for injunctive relief in his or her official capacity is a "person" within the meaning of § 1983 because "official-capacity actions for prospective relief are not treated as actions against the State." *Id.* at 71 n. 10

(quoting *Kentucky v. Graham*, 473 U.S. 159, 167 n. 14 (1985)).

To constitute a permissible action for prospective injunctive relief, the case must be one "in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past. . . ." *Papasan v. Allain*, 478 U.S. 265, 277-78 (1986). "Remedies designed to end a continuing violation of federal law are necessary to vindicate the federal interest in assuring the supremacy of that law. But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Id.* at 278 (quoting *Green v. Mansour*, 474 U.S. 64, 68 (1985) (citation omitted)).

The University of Cincinnati (including the University of Cincinnati College of Medicine) is a state instrumentality entitled to Eleventh Amendment immunity. *Weaver v. University of Cincinnati*, 758 F.Supp. 446 (S.D. Ohio 1991); *Dillion v. University Hospital*, 715 F.Supp. 1348 (S.D. Ohio 1989). The issue, then, is whether Dr. Thomson has alleged claims for prospective injunctive relief which are excepted from Eleventh Amendment immunity pursuant to *Ex parte Young* and its progeny.

In the case at bar, Dr. Thomson alleges that, by denying him access to research facilities and maintaining false documentation in his personnel file, the defendants are continuing to deprive him of his property and liberty interests without due process of law. He seeks injunctive relief in the form of admittance to the facilities and removal of the false documents from his file. He further seeks a declaratory judgment that the defendants have

and are continuing to violate his constitutional rights. These claims for injunctive relief from a continuing constitutional violation fit squarely within the *Ex parte Young* exception to Eleventh Amendment immunity.

Accordingly, the defendants' motion to dismiss and/or for summary judgment on plaintiff's § 1983 claims against the defendants in their official capacities is hereby denied.

State Law Official Capacity Claims

The *Ex parte Young* exception does not apply to claims that a state official is violating *state* law. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). Specifically, the Court concluded:

> In such a case the entire basis for the doctrine of *Young* and *Edelman* disappears. A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that *Young* and *Edelman* are inapplicable in a suit against state officials on the basis of state law.

Id. at 106.

In the case at bar, Dr. Thomson attempts to assert state law claims against state employees in their official

capacities. Such claims are clearly barred by the Eleventh Amendment.

Accordingly, the defendants' motion to dismiss and/or for summary judgment on plaintiff's state law claims against defendants in their official capacities is hereby granted.

State Law Individual Capacity Claims

With certain narrow exceptions, state employees in Ohio are immune from suit in their individual capacities. Ohio Rev. Code § 9.86. That statute provides:

> Except for civil actions that arise out of the operation of a motor vehicle and civil actions in which the state is the plaintiff, no officer or employee shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions were manifestly outside the scope of his employment or official responsibilities, or unless the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

Ohio Rev. Code § 9.86 (Page's 1990). Ohio's state employee immunity provision is supplemented by Ohio Revised Code § 2743.01(F). Section 2743.01(F) provides:

> A civil action against a state officer or employee that alleges that the officer's or employee's conduct was manifestly outside the scope of the officer's or employee's employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed

> against the state in the Court of Claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled to civil immunity under § 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

Ohio Rev. Code § 2743.01(F) (Page's 1990).

Pursuant to the Ohio statutory scheme, then, a state employee is immune from suit on state law claims in his individual capacity unless one of four exceptions applies: (1) the action arises out of the operation of a motor vehicle; (2) the state is the plaintiff; (3) the employee's actions were manifestly outside the scope of his employment; or (4) the employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner. Ohio Rev. Code § 9.86 (Page's 1990). If either exception number one or exception number two applies, the employee is not immune. Ohio Rev. Code § 9.86 (Page's 1990). However, if exception number three or exception number four arguably applies, the plaintiff must submit a claim to the Court of Claims for a determination whether the employee is immune. Ohio Rev. Code § 2743.01(F); *Haynes v. Marshall*, 887 F.2d 700, 704 (6th Cir. 1989). "Under Ohio law, then, state employees may not be sued unless and until it has been determined by the Court of Claims that they are not entitled to immunity." *Haynes*, 887 F.2d at 704.

The instant action did not arise out of the operation of a motor vehicle. The state is not the plaintiff, here. Therefore, under Ohio law, the state employees in this case are immune from suit until the Court of Claims determines otherwise.

Accordingly, the defendants' motion to dismiss and/or for summary judgment on plaintiff's state claims against the defendants in their individual capacities is hereby granted.

CONCLUSION

For the reasons set forth above, the defendants' motion to dismiss and/or for summary judgment is denied as to the plaintiff's § 1983 claims against defendants in their official capacities. However, the motion is granted as to the plaintiff's state claims against the defendants in their individual or official capacities.

SO ORDERED.

Dated: June 8, 1992 /s/ S. Arthur Spiegel
S. Arthur Spiegel
United States District Judge

No. 93-4089

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL E. THOMSON, M.D., Plaintiff-Appellant,	)	
v.	)	ORDER
JUDITH A.K. HARMONY, ET AL., Defendants-Appellees.	)	(Filed Nov. 1, 1995)

BEFORE: MERRITT, Chief Judge; KEITH and BOGGS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Merritt would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk pe

OHIO Revised Code

2743.02 Waiver of immunity of state; personal immunity not available to state; hospitals of political subdivisions; collateral recovery; indemnification of personnel; actions against state personnel; third-party complaints and counter-claims

(A)(1) The state hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter in accordance with the same rules of law applicable to suits between private parties, except that the determination of liability is subject to the limitations set forth in this chapter and, in the case of state universities or colleges, in section 3345.40 of the Revised Code, and except as provided in division (A)(2) of this section. To the extent that the state has previously consented to be sued, this chapter has no applicability.

Except in the case of a civil action filed by the state, filing a civil action in the court of claims results in a complete waiver of any cause of action, based on the same act or omission, which the filing party has against any officer or employee, as defined in section 109.36 of the Revised Code. The waiver shall be void if the court determines that the act or ommission was manifestly outside the scope of the officer's or employee's office or employment or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner.

(2) If a claimant proves in the court of claims that an officer or employee, as defined in section 109.36 of the Revised Code, would have personal liability for his acts

or omissions but for the fact that the officer or employee has personal immunity under section 9.86 of the Revised Code, the state shall be held liable in the court of claims in any action that is timely filed pursuant to section 2743.16 of the Revised Code and that is based upon the acts or omissions.

(B) The state hereby waives the immunity from liability of all hospitals owned or operated by one or more political subdivisions and consents for them to be sued, and to have their liability determined, in the court of common pleas, in accordance with the same rules of law applicable to suits between private parties, subject to the limitations set forth in this chapter. This division is also applicable to hospitals owned or operated by political subdivisions which have been determined by the supreme court to be subject to suit prior to July 28, 1975.

(C) Any hospital, as defined under section 2305.11 of the Revised Code, may purchase liability insurance covering its operations and activities and its agents, employees, nurses, interns, residents, staff, and members of the governing board and committees, and, whether or not such insurance is purchased, may, to such extent as its governing board considers appropriate, indemnify or agree to indemnify and hold harmless any such person against expense, including attorney's fees, damage, loss, or other liability arising out of, or claimed to have arisen out of, the death, disease, or injury of any person as a result of the negligence, malpractice, or other action or inaction of the indemnified person while acting within the scope of his duties or engaged in activities at the request or direction, or for the benefit, of the hospital. Any hospital electing to indemnify such persons, or to

agree to so indemnify, shall reserve such funds as are necessary, in the exercise of sound and prudent actuarial judgment, to cover the potential expense, fees, damage, loss, or other liability. The superintendent of insurance may recommend, or, if such hospital requests him to do so, the superintendent shall recommend, a specific amount for any period that, in his opinion, represents such a judgment. This authority is in addition to any authorization otherwise provided or permitted by law.

(D) Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

(E) The only defendant in original actions in the court of claims is the state. The state may file a third-party complaint or counterclaim in any civil action, except a civil action for two thousand five hundred dollars or less, that is filed in the court of claims.

(F) A civil action against an officer or employee, as defined in section 109.36 of the Revised Code, that alleges that the officer's or employee's conduct was manifestly outside the scope of his employment or official responsibilities, or that the officer or employee acted with malicious purpose, in bad faith, or in a wanton or reckless manner shall first be filed against the state in the court of claims, which has exclusive, original jurisdiction to determine, initially, whether the officer or employee is entitled

to personal immunity under section 9.86 of the Revised Code and whether the courts of common pleas have jurisdiction over the civil action.

The filing of a claim against an officer or employee under this division tolls the running of the applicable statute of limitations until the court of claims determines whether the officer or employee is entitled to personal immunity under section 9.86 of the Revised Code.

2743.11 Jury trials; limitation

No claimant in the court of claims shall be entitled to have his civil action against the state determined by a trial by jury. Parties retain their right to trial by jury in the court of claims of any civil actions not against the state.

Jury trials shall be conducted at the court of claims, the court of common pleas of Franklin county, or the court of common pleas of the county in which a removed case is tried. Juries shall be drawn from the common pleas list of qualified jurors, and empaneled in the same manner as in cases that originate in the court of common pleas. The state shall pay all expenses incidental to a jury trial, except that juror costs shall be taxed to the losing party.

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§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

AMENDMENT I – FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV – CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the

United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

(2)

No. 95-1301

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

PAUL E. THOMSON, M.D.,
Petitioner,

v.

JUDITH A.K. HARMONY, PH.D., ANDREW T. FILAK, JR., M.D., EVELYN V. HESS, M.D., GENE CONWAY, M.D., JOHN HUTTON, M.D., JOSPEH BRODERICK, M.D., MICHAEL E. LUGGEN, M.D., [*sic*] and KATHLEEN ROBBINS,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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5 pp

QUESTION PRESENTED

Whether the State of Ohio may conditionally waive its Eleventh Amendment immunity.

CONSTITUTIONAL PROVISION

U.S. CONST. amend. XI

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Respondents adopt for their statement of the case that which is contained in the opinion of the Sixth Circuit Court of Appeals below issued September 18, 1995, reported at 65 F.3d 1314 and reproduced in Petitioner's Brief at App. 2-5. Respondents note that Dr. Michael E. Luggen, whose name appears in the caption of Petitioner's Brief, was never named as a party in the federal case below, but was a "straw man" defendant in the Ohio Court of Claims action in place of Dr. Donald K. Ebersold, who was a party in the original federal case. See Opinion of the Sixth Circuit Court of Appeals below at 65 F.3d 1314, 1320 & n.5 reproduced in Petitioner's Brief at App. 10.

REASONS FOR DENYING THE PETITION

1. The decision of the Sixth Circuit Court of Appeals below, reaffirming its longstanding interpretation of Ohio Rev. Code § 2743.02(A)(1) as a conditional waiver of Ohio's Eleventh Amendment immunity, is unrelated to the Ohio Supreme Court's holding with respect to Ohio Rev. Code § 2742.02(F) in *Conley v. Shearer*, 64 Ohio St. 3d 284, 595 N.E.2d 862 (1992), upon which Petitioner relies.

2. The Sixth Circuit Court of Appeals' interpretation of the impact of Ohio Rev. Code § 2743.02(A)(1) on a parallel federal claim under 42 U.S.C. § 1983 has been established law for nearly a decade. This Court has previously denied certiorari on this same issue. *Leaman v. Ohio Department of Developmental Disabilities*, 825 F.2d 946 (6th Cir. 1987), cert. den., 487 U.S. 1204 (1988). The *Leaman* doctrine is the accepted and usual course of judicial proceedings in the Sixth Circuit.

Conley v. Shearer, whose syllabus is the statement of the law of that case, (see *Ohio v. Gallagher*, 425 U.S. 257, 259 (1976) and *Cassidy v. Glossip*, 12 Ohio St. 2d 17, paragraph six of syllabus, 231 N.E.2d 64 (1967)), deals only with Ohio Rev. Code § 2743.02(F) and presents no basis for review of Ohio Rev. Code § 2743.02(A)(1).

Furthermore, Petitioner's "exhaustion of state remedies" analysis concerns a matter which is not an issue in this case. Petitioner simply elected a special remedy created by Ohio's conditional waiver of its Eleventh Amendment immunity. Petitioner's election to seek redress of his claims in Ohio's Court of Claims was in exchange for redress of claims against state employees in federal court based upon the same acts or omissions.

Ohio Rev. Code § 2743.02(A)(1); *Leaman*, 825 F.2d 946. Thus, it was Petitioner's election of a particular remedy, not any requirement of exhaustion of remedies, which resulted in dismissal of his federal claims.

CONCLUSION

Petitioner has stated no basis for this Court to grant a Writ of Certiorari. Respondents respectfully pray that a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Sixth Circuit entered on November 1, 1995 be denied.

Respectfully submitted,

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